

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HUGO LUA,
Petitioner,
v.
WARDEN RAMOS,
Respondent._____
Case No. EDCV 18-1065 DMG(JC)
ORDER DISMISSING PETITION
FOR WRIT OF HABEAS CORPUS
AND ACTION WITHOUT
PREJUDICE

I. SUMMARY

On May 17, 2018, petitioner Hugo Lua, a California prisoner who is proceeding *pro se*, formally filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Current Federal Petition”) challenging a 2008 judgment in San Bernardino County Superior Court Case No. FVA701383 (“State Case” or “State Conviction”), claiming that his trial counsel was ineffective in multiple respects and that the trial court committed multiple errors.

Based on the record (including facts as to which this Court takes judicial notice as detailed below) and the applicable law, the Current Federal Petition and this action are dismissed without prejudice for lack of jurisdiction because petitioner did not obtain the requisite authorization from the Court of Appeals to

1 file a successive petition. Further, the Clerk of the Court is directed to
2 refer the Current Federal Petition to the United States Court of Appeals for the
3 Ninth Circuit (“Ninth Circuit”) pursuant to Ninth Circuit Rule 22-3(a).¹

4 **II. PERTINENT PROCEDURAL HISTORY²**

5 **A. The State Case**

6 On May 22, 2008, petitioner was convicted of two counts of carjacking. On
7 June 23, 2008, the court sentenced petitioner to 28 years and 4 months in state
8 prison. The California Court of Appeal thereafter affirmed the judgment.
9 Petitioner did not seek direct review in the California Supreme Court. Petitioner
10 thereafter sought and was denied post-conviction relief in at least the San
11 Bernardino County Superior Court and the California Supreme Court.

12 **B. First Federal Action and Ninth Circuit Action**

13 On March 12, 2013, petitioner formally filed the First Federal Petition
14 challenging the judgment in the State Case. On April 4, 2014, the assigned
15 Magistrate Judge issued a Report and Recommendation (“Prior R&R”)
16 recommending that the First Federal Petition be denied and the First Federal
17 Action be dismissed with prejudice because the First Federal Petition was
18 untimely. On May 14, 2013, the assigned District Judge approved and accepted

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20 ¹Ninth Circuit Rule 22-3(a) provides in pertinent part: “Any petitioner seeking
21 authorization to file a second or successive 2254 petition . . . in the district court must file an
22 application in the Court of Appeals demonstrating entitlement to such leave under 28 U.S.C.
23 § 2254 . . . If a second or successive petition . . . is mistakenly submitted to the district court,
24 the district court shall refer it to the [C]ourt of [A]ppeals.”

25 ²The facts and procedural history set forth in this section are derived from the Current
26 Federal Petition and court records in the Central District of California (CDCA) and the Ninth
27 Circuit in the following cases of which this Court takes judicial notice: (1) Hugo Lua v. Warden
28 G. Lewis, CDCA Case No. EDCV 13-461-DOC (JCG) (“First Federal Petition” or “First
Federal Action”); and (2) Hugo Lua v. G. Lewis, Ninth Circuit Case No. 13-56145 (“Ninth
Circuit Action”). See Fed. R. Evid. 201; Harris v. County of Orange, 682 F.3d 1126, 1131-32
(9th Cir. 2012) (court may take judicial notice of undisputed matters of public record including
documents on file in federal or state courts).

1 the Prior R&R and ordered that judgment be entered denying the First Federal
2 Petition and dismissing the First Federal Action with prejudice. Judgment was
3 entered accordingly on May 15, 2013. On October 28, 2013, the Ninth Circuit
4 denied petitioner's request for a certificate of appealability in the Ninth Circuit
5 Action because petitioner's notice of appeal was not timely filed.

6 **C. Current Federal Petition**

7 As noted above, on May 17, 2018, petitioner formally filed the Current
8 Federal Petition which again challenges the judgment in the State Case.

9 The record does not reflect that petitioner has obtained authorization from
10 the Ninth Circuit to file the Current Federal Petition in District Court.³

11 **III. DISCUSSION**

12 Before a habeas petitioner may file a second or successive petition in a
13 district court, he must apply to the appropriate court of appeals for an order
14 authorizing the district court to consider the application. Burton v. Stewart, 549
15 U.S. 147, 152-53 (2007) (citing 28 U.S.C. § 2244(b)(3)(A)). This provision
16 “creates a ‘gatekeeping’ mechanism for the consideration of second or successive
17 applications in district court.” Felker v. Turpin, 518 U.S. 651, 657 (1996); see also
18 Reyes v. Vaughn, 276 F.Supp.2d 1027, 1028-30 (C.D. Cal. 2003) (discussing
19 applicable procedures in Ninth Circuit). A district court lacks jurisdiction to
20 consider the merits of a second or successive habeas petition in the absence of
21 proper authorization from a court of appeals. Cooper v. Calderon, 274 F.3d 1270,
22 1274 (9th Cir. 2001) (per curiam) (citing United States v. Allen, 157 F.3d 661, 664
23 (9th Cir. 1998)), cert. denied, 538 U.S. 984 (2003).

24 The court of appeals may authorize the filing of a second or successive
25 petition only if it determines that the petition makes a *prima facie* showing that at
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28 ³A search of the court's PACER system does not reflect that petitioner has been granted
leave to file a second or successive petition by the Ninth Circuit.

1 least one claim within the petition satisfies the requirements of 28 U.S.C.
2 Section 2244(b), *i.e.*, that a claim which was not presented in a prior application (1)
3 relies on a new rule of constitutional law, made retroactive to cases on collateral
4 review by the Supreme Court; or (2) the factual predicate for the claim could not
5 have been discovered previously through the exercise of due diligence and the facts
6 underlying the claim would be sufficient to establish that, but for constitutional
7 errors, no reasonable factfinder would have found the applicant
8 guilty of the underlying offense. Nevius v. McDaniel, 104 F.3d 1120, 1120-21
9 (9th Cir. 1997); Nevius v. McDaniel, 218 F.3d 940, 945 (9th Cir. 2000).

10 A second or subsequent habeas petition is not considered “successive” if the
11 initial habeas petition was dismissed for a technical or procedural reason, rather
12 than on the merits. See Slack v. McDaniel, 529 U.S. 473, 485-487 (2000) (second
13 habeas petition not “successive” if initial habeas petition dismissed for failure to
14 exhaust state remedies); Stewart v. Martinez-Villareal, 523 U.S. 637, 643-645
15 (1998) (second habeas petition not “successive” if claim raised in first habeas
16 petition dismissed as premature); but see McNabb v. Yates, 576 F.3d 1028, 1030
17 (9th Cir. 2009) (dismissal on statute of limitations grounds constitutes disposition
18 on the merits rendering subsequent petition “second or successive”); Henderson v.
19 Lampert, 396 F.3d 1049, 1053 (9th Cir.) (dismissal on procedural default grounds
20 constitutes disposition on the merits rendering subsequent petition “second or
21 successive”), cert. denied, 546 U.S. 884 (2005); Plaut v. Spendthrift Farm, Inc.,
22 514 U.S. 211, 228 (1995) (dismissal for failure to prosecute treated as judgment on
23 the merits) (citations omitted).

24 Petitioner’s First Federal Petition was denied and the First Federal Action
25 was dismissed with prejudice as untimely – a determination which the Ninth
26 Circuit has deemed to constitute a disposition on the merits. See McNabb, 576
27 F.3d at 1030. Accordingly, the Current Federal Petition is successive. Since
28 petitioner filed the Current Federal Petition without authorization from the Ninth

1 Circuit, this Court lacks jurisdiction to consider it.

2 **IV. ORDER**

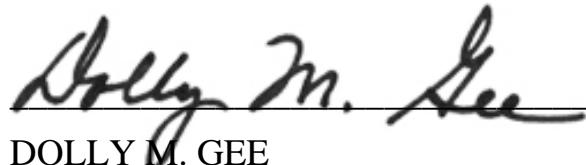
3 IT IS THEREFORE ORDERED that the Current Federal Petition and this
4 action are dismissed without prejudice.

5 IT IS FURTHER ORDERED that the Clerk of the Court shall refer the
6 Current Federal Petition to the Ninth Circuit.

7 IT IS SO ORDERED.

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9 DATED: June 1, 2018

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11 _____
12 DOLLY M. GEE
13 UNITED STATES DISTRICT JUDGE

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